

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE



FISCAL NOTE

SB 170 - HB 164

March 5, 2013

SUMMARY OF BILL: Replaces references to the Department of General Services” and “Department of Finance and Administration” with the “Central Procurement Office”; replaces “Commissioner of General Services” and “Commissioner of Finance and Administration” with “Chief Procurement Officer”; replaces “supplies, materials, and equipment” with “goods and services”; replaces “department, institution, or agency” with “state governmental agency”; replaces “bids” with “solicitations”; and “bidders” with “respondents.”

Under Tenn. Code Ann. § 12-3-107 the Chief Procurement Officer (CPO) is required to adopt rules and regulations for certain purposes regarding procurement and to submit such rules and regulations to the Procurement Commission for approval. The proposed bill deletes the requirement that the CPO submit such rules and regulations for Commission approval and instead specifies that such matters regarding procurement would be the power and the duty of the CPO.

Tennessee Code Ann. § 12-3-107 also contains provisions for the transfer, distribution, and sale of surplus supplies, materials, and equipment. The proposed bill deletes such provisions.

Tennessee Code Ann. § 4-56-105 specifies the CPO has the authority to delegate authority with the approval of the Comptroller of the Treasury to designees or to any department, agency, or official as prescribed in rules, regulations, standards, and policies approved by the Procurement Commission. The proposed bill replaces “approval of the Comptroller of the Treasury” with “subject to additional approvals.”

Under Tenn. Code Ann. §4-56-108 the Fiscal Review Committee (FRC) has 40 business days from receipt of a proposed non-competitive contract or amendment to review and comment on such document. The proposed bill reduces, from 40 to 20 days, such time period.

Under Tenn. Code Ann. §12-4-110 purchases by and for the legislative department, the University of Tennessee (UT), the state university and community college system, and state technical institutes, and contracts awarded by the State Building Commission (SBC) pursuant to Tenn. Code Ann. § 4-15-102 are exempt, subject to the policies of the Procurement Commission, from the operation of the procurement law. The proposed bill specifies that exemption includes purchases and contracts by the legislative and judicial branches. Adds language that specifies if there is a question whether a contract or procurement required SBC or CPO approval, the CPO and the State Architect shall determine in writing the procurement method or the contract form that is in the best interest of the state. Any such agreement reached by the CPO and the State Architect shall be subject to approval by the Comptroller of the Treasury.

Under Tenn. Code Ann. § 12-4-106 contracts by municipal and public corporations of the state, for legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons are not based upon competitive bids, but are awarded on the basis of recognized competence and integrity. The proposed bill extends this provision regarding such professional services to apply to all state entities, instead of only to municipal and public corporations of the state.

Tennessee Code Ann. § 12-3-133 requires each state agency to submit to the CPO an annual acquisition plan for the upcoming fiscal year, by July 1 of each year. The proposed bill requires that such plan be submitted by "April 1", instead of "July 1", of each year and requires that such plan be submitted to the Comptroller, in addition to the CPO. Additionally, the proposed bill authorizes an agency to amend or supplement its acquisition plan before the end of a given fiscal year for unforeseen circumstances pursuant to rules, regulations and policies adopted by the Commission.

Under Tenn. Code Ann. § 12-4-110 any personal services, professional services or consultant services contract entered into by an executive department or agency of the state government must be executed by the head of such department or agency and approved by the CPO. Contracts calling for expenditures from appropriations of more than one fiscal year must be approved by the Comptroller of the Treasury. The proposed bill deletes this provision. Also, current law requires such contracts for financial management or accounting services to be approved by the Comptroller of the Treasury. The proposed bill revises this provision and states such approval must be by the Commissioner of Finance and Administration.

Under Tenn. Code Ann. § 12-4-110 contracts of the University of Tennessee (UT) and the state university and community college system need not be approved by the CPO, but they shall be subject to applicable provisions of the rules described in Tenn. Code Ann. § 12-4-109. The proposed bill revises this provision and specifies that such contract of the UT system and the Tennessee Board of Regents system are subject to the rules and policies promulgated by the CPO and approved by the Procurement Commission.

Under Tenn. Code Ann. § 12-4-110 contracts executed or proposed to be executed for more than 12 months must contain a provision giving the state the right of cancellation at any time with no more than one year's notice, and at the end of any fiscal year without notice, in the event that funds to support the contract become unavailable. The proposed bill states such contract may contain a provision giving the state the right of cancellation for convenience for periods of time established by the CPO and deletes the language "at any time with no more than one year's notice" from such provision.

Tennessee Code Ann. § 12-3-203 authorizes the CPO to reject all bids for a certain purchase only for the following reasons: unreasonably high prices, error in invitation to bid, cessation of need, unavailability of funds, or for any other reason approved by the Procurement Commission. The proposed bill deletes the language "any other reason approved by the Procurement Commission" and replaces it with "any other reason determined to be in the best interest of the state".

Tennessee Code Ann. § 12-3-204 authorizes the Procurement Commission to allow the director of purchases to establish an informal purchasing procedure, including the solicitation of telephone bids, for purchases not exceeding the amount established by the Commission. Such amount may not exceed \$25,000, if the Commission unanimously agrees upon the amount, and may not exceed \$10,000, if the Commission does not unanimously agree on a higher amount. The proposed bill authorizes the Procurement Commission to allow the CPO to establish informal solicitation procedures for procurements. The maximum amount of the procurement would be \$50,000 or less, if all of the members of the Commission agree and \$25,000 or less, if the members of the Commission approve, but not unanimously.

Under Tenn. Code Ann. §12-3-210 any procurement of \$50,000 or less must be approved by the CPO and be made without requisitioning such goods or services through the department, if a source of supply has not otherwise been established. All such procurements must be posted on the Procurement Office's Internet site and must provide certain information, including the status of the order. This bill removes the requirement that such procurements be approved by the CPO and removes the requirement that the information posted on the web site include the status of the order. Currently, such purchases that exceed \$100 or a higher amount, if the Procurement Commission unanimously agrees upon the amount, must, whenever practical, be based upon at least three competitive bids and be made in accordance with the procurement law. The proposed bill removes this provision. The proposed bill authorizes the Procurement Commission to allow the CPO to establish small purchase procedures. The maximum amount of the purchases would be \$10,000 or less, if all the members of the Procurement Commission agree and \$5,000 or less if the members of the Commission approve, but not unanimously.

Generally, any procurement of \$50,000 or less must be approved by the CPO and be made without requisitioning such goods or services through the department, if a source of supply has not otherwise been established. All such procurements must be posted on the Procurement Office's Internet site and must provide certain information, including the status of the order. This bill removes the requirement that such procurements be approved by the CPO and removes the requirement that the information posted on the web site include the status of the order.

Under Tenn. Code Ann. § 12-3-208 a contract may be entered into by competitive negotiation "only in cases when the state is unable to obtain needed goods and/or services by competitive sealed bid". The proposed bill revises this provision to instead specify that a contract may be entered into by competitive negotiation "when it is determined by the CPO that it is in the best interests of the state".

Tennessee Code Ann. § 12-3-216 authorizes the CPO to enter into cooperative purchasing agreements with other states, local governments and higher education institutions, as long as each contract is established through competitive sealed bids and each procurement has the prior approval of the Procurement Commission. The proposed bill rewrites this provision to instead authorize the CPO to participate in, sponsor, conduct or administer a cooperative purchasing agreement for the procurement of goods or services with one or more other states or local governments in accordance with an agreement entered into between the participants. All such cooperative purchasing would be awarded through full and open competition and pursuant to policies or rules and regulations adopted by the Procurement Commission.

Under Tenn. Code Ann. § 12-3-302 the state is entitled to audit the books and records of a contractor or subcontractor, to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records must be maintained by the contractor or subcontractor for three years from the date of final payment, unless a shorter period is otherwise authorized in writing. The proposed bill requires, after July 1, 2013, that all contracts include a provision with this statutory requirement and said provision cannot be amended or removed without the written consent of the Comptroller of the Treasury.

Under Tenn. Code Ann. § 12-3-314 the CPO must permit contracts for telecommunications and information technology goods and services a limitation of liability of at least two times the value of the contract as long as the limitation of liability does not apply to intentional torts, criminal acts, fraudulent conduct, or acts or omissions that result in personal injuries or death. However, if the CPO determines that it is necessary to protect the interests of the state, the CPO may petition the Procurement Commission to approve contractor liability in excess of two times the value of the contract. If the Commission agrees with the CPO, it may approve such a higher liability amount. The proposed bill revises who would increase the limitation of liability to instead specify that if the CPO determines that it is necessary to protect the interests of the state to increase the limitation of liability, then the CPO, the Comptroller of the Treasury, and Commissioner of Finance and Administration may increase the limitation of liability of the contractor to an amount in excess of two times the value of the contract. Furthermore, the proposed bill specifies that the purpose of limiting the liability of the purchase of goods and services is to limit the monetary damages recoverable by the state in a claim or legal action against its contractor, and the bill does not authorize any further limitation on the legal rights of the state, does not constitute a waiver of sovereign immunity of the state, and does not authorize a cause of action against the state in any jurisdiction.

Tennessee Code Ann. § 12-3-704 authorizes the CPO to satisfy any requirement for mailing by distributing solicitations electronically. The proposed bill requires that such electronically distributed solicitations also be posted to the CPO's Internet site.

Under Tenn. Code Ann. §12-3-803 a "Tennessee small business" is defined as a business that is a continuing, independent, for profit business which performs a commercially useful function with residence in Tennessee, and has total gross receipts of no more than \$10 million averaged over a three-year period and employs no more than 30 persons on a full-time basis. The proposed bill revises the current definition of "Tennessee small business" and adds a new definition for "small business" to specify that it is either a business that is a continuing, independent, for profit business which performs a commercially useful function with residence in Tennessee, and has total gross receipts of no more than \$10 million averaged over a three-year period or employs no more than 30 persons on a full-time basis.

Tennessee Code Ann. § 4-56-109 defines "immediate family" relative to conflict of interest as a spouse or minor child living in the household. The proposed bill expands the definition to include dependent children, stepchildren, or relatives related by blood or marriage.

Under Tenn. Code Ann. § 12-3-908 in order for non-admitted surplus lines carriers to be eligible for consideration under this section, at least two admitted carriers must have declined to submit a proposal, and the non-admitted carriers must, among other conditions, have a minimum A.M. Best financial strength rating of A- and an A.M. Best financial size category of no less than VI. The proposed bill revises the minimum A.M. Best financial strength rating to “A” rather than “A-”.

Tennessee Code Ann. § 12-3-203 requires multi-step sealed bidding on the acquisition of departmental computer systems involving the purchase of hardware and the development of application software and authorizes such bidding on any acquisition, subject to the approval of the CPO and notice of such procurements posted on the CPO’s Internet site. The proposed bill deletes these provisions.

Tennessee Code Ann. § 12-3-218 authorizes the Department of General to use the best value procurement methodology when determined to be in the best interest of the state and establishes various provisions regarding such procurement methodology. The proposed bill removes the provisions regarding the best value procurement methodology.

Tennessee Code Ann. §12-3-1101 establishes the State and Local Government Advisory Committee to monitor all initiatives related to the use of the Internet for purchasing by state agencies and local governments and to advise the General Assembly of any needed changes in law. The proposed bill deletes the Committee and all provisions regarding such Committee.

ESTIMATED FISCAL IMPACT:

NOT SIGNIFICANT

Assumptions:

- Decreasing the amount of time the FRC has to review and comment on non-competitive contracts and amendments will not have a significant fiscal impact. Any increase in workload because of the shorten timeframe can be accommodated within existing resources.
- Any revisions to the review and approval required by the Comptroller of the Treasury will not result in a significant fiscal impact and can be accomplished within existing resources.
- According to the Department of General Services (DGS), no members of the State and Local Government Advisory Committee received reimbursement for travel. Deleting such Committee will not have a fiscal impact to the state.
- According to DGS, the proposed bill does not have a fiscal impact to the Department. Estimate assumes deleting provisions relative to multi-step sealed bidding for computer hardware and software, and the provisions relative to best value procurement methodology will not have a fiscal impact to the state.

- According to DGS, revising the minimum A.M. Best financial strength rating from “A-” to “A” is a typographical error and therefore will not have a fiscal impact to state government.

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in black ink, appearing to read "Lucian D. Geise". The signature is fluid and cursive, with the first name "Lucian" written in a larger, more prominent script than the last name "Geise".

Lucian D. Geise, Executive Director

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